In the Supreme Court of the United States

October Term, 1978
No. 78-1076

STATE OF RHODE ISLAND,

Petitioner,

v.

THOMAS J. INNIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of California files this amicus brief pursuant to the provisions of Rule 42(4) of the Rules of the Supreme Court of the United States.

The State of California has an interest in the resolution of the questions presented to this Honorable Court for review and in the scope of the rules promulgated in *Miranda v. Arizona* (1966) 384 U.S. 436 in aid of the provisions of the Fifth Amendment to the United States Constitution that no person "shall be compelled in any criminal case to be a witness against himself."

California appeared as a party before the Court in one of the companion cases to *Miranda* (*California v. Stewart*, No. 584, 384 U.S. 436, 497), and appearances have been made as a party and as amicus in cases raising *Miranda* issues before this Court since 1966. California joined with others in an amicus brief in *Brewer v. Williams* (1977) 430 U.S. 387, urging that the procedural ruling in *Miranda* be re-examined and overruled. As observed by Mr. Justice Blackmun, dissenting (p. 438), the issue did not have to be considered in that case. It is acknowledged that the same may be true in the instant case.

However, California is concerned with the resolution of the question, now ripe for decision, whether *Miranda* requires a per se rule of exclusion of all statements of a suspect in custody, who after receiving the warnings and invoking the right to counsel, thereafter knowingly and voluntarily waives the right and makes incriminating admissions.

Amicus is also concerned with the "expansion" of the concept of "interrogation" as that term was used in *Miranda* and with the application of the Sixth Amendment requirements as to counsel from *Brewer v. Williams, supra.*

The first issue that will be addressed by amicus will be the matter raised in the dissent in the instant case that,

> "The views expressed by the majority come perilously close to fulfilling the worst fears of the four Brewer dissenters, who expressed concern that the majority in Brewer was really holding that once a suspect has asserted his right not to talk without the presence of an attorney, '*It becomes legally impossible for him to waive that right until he has seen an attorney.*' . . . "

> (Emphasis added; *State v. Innis* (R.I. 1978) 391 App.2d 1158 at p. 1172.)

INTRODUCTION

Respondent, Thomas J. Innis, was found guilty after a jury trial of murder in the first degree, kidnapping and robbery. The matter is before this Honorable Court on the granting of the petition of the State of Rhode Island following a 3-2 decision of the Supreme Court of Rhode Island vacating the judgments of conviction and remanding the matter to the Superior Court for retrial.

The facts necessary to resolution of the constitutional questions presented in this case are not in serious dispute and amicus will rely on the statement contained in the Petitioner's Opening Brief, with record references.

The body of the victim, one John Mulvaney, a cab driver, was found in a shallow grave in Coventry, Rhode Island on January 16, 1975. Death had resulted from a shotgun blast to the back of the head.

Innis became a suspect and the police were informed that he was seen in an area of Providence carrying a sawed-off shotgun. A search of the area began.

Patrolman Robert M. Lovell of the Providence Police Department apprehended Innis in the early morning of January 17, 1975, at about 4:30 a.m.

Lovell placed respondent Innis under arrest and advised him of his constitutional rights pursuant to *Miranda.*

Thereafter Sergeant Francis J. Sears arrived at the scene of the arrest and also gave Innis his *Miranda* warnings.

In response to a call that respondent had been apprehended Captain John J. Leyden arrived and Innis was

again advised of his rights.

Following the Captain's warning Innis stated that he wanted an attorney.

The Captain then directed three officers, Gleckman, McKenna and Williams, to place Innis in the caged wagon and transport him to the central station.

The Captain also directed them not to question the defendant or intimidate or coerce him in any way.

While en route to the station Patrolman Gleckman, who had been on the force less than two years, began a conversation with Patrolman McKenna. Innis could hear the conversation within the vehicle.

Gleckman told McKenna that there was a school for handicapped children in the area of the search for the shotgun and he expressed fear that one of the children might find the gun and be injured.

Gleckman did not address Innis and he was not questioned in any way.

At this point Innis said, "Stop, turn around, I'll show you where it is."

McKenna then got on the "mike" and told the captain that they were returning and that Innis was going to show them where the weapon was.

The vehicle had traveled less than a mile and they returned to the arrest scene within minutes of leaving.

When Innis alighted from the wagon Captain Leyden again advised him of his rights and Innis expressed his understanding of those rights but that he wanted to show them where the weapon was because of the school that was in the area and the "small kids around." He was placed in the wagon and all cars proceeded to a nearby field and the

shotgun, which was the subject of the motion for suppression, was located.

The defendant did not testify at the voir dire and the facts are not disputed.

The trial judge ruled that the shotgun was admissible.

The majority of the Rhode Island Supreme Court held that Innis had exercised his *Miranda* right to counsel and that Gleckman's statement to McKenna constituted "interrogation" without a valid waiver of this right and that the weapon should have been suppressed.

SUMMARY OF ARGUMENT

In holding that the shotgun received in evidence in this robbery-murder case must be suppressed, the Rhode Island Supreme Court, by a 3-2 majority, in effect held that when a suspect in custody, after receiving *Miranda* warnings a number of times, asserts "his right not to talk without the presence of an attorney, it becomes legally impossible for him to waive that right until he has seen an attorney." (*State v. Innis, supra,* at p. 1172.)

Amicus urges that *Miranda* does not set forth any such judicial straitjacket on an informed suspect's right to change his mind for whatever purpose satisfies his interests, and free of compulsion, to voluntarily, intentionally and knowingly waive that right without the presence of an attorney.

In setting forth such a per se rule the holding below constitutes an unwarranted extension of the *Miranda* requirements and is contrary to the majority of the cases, federal and state, that have had recent occasion to consider the issue. To create such an inflexible rule would go beyond the requirements of the Fifth Amendment and the "totality of circumstances" approach to waiver ques-

tions. In this case, without any suggestion of coercion, the respondent voluntarily chose to speak and to tell the officers to turn around, that he would show them where to find the weapon.

This constitutes a knowing and voluntary waiver of the rights of which Innis had recently been advised a number of times, he was aware that his wishes in this regard would be scrupulously respected and that he did not have to speak. Under the facts and circumstances of this case, respondent waived his right to the presence of counsel when he spoke voluntarily and then expressly when again (for a fourth time) Captain Leyden advised him of his rights and he expressed his understanding of those rights and indicated that he wanted to show the officers where the weapon was located.

The Rhode Island Supreme Court was also in error in holding that the conversation between Officers Gleckman and McKenna constituted "interrogation" of respondent and in relying on the Sixth Amendment case of *Brewer v. Williams, supra,* 430 U.S. 387, for the rule that such conversation, not directed to respondent and without any intent to elicit incriminating statements from the accused, was violative of this Court's decision in *Miranda.*

The prophylactic rules announced in *Miranda,* representing a careful accomodation of the rights of the accused and the reasonable and legitimate needs of law enforcement would be, by such a rule as announced by the Rhode Island Supreme Court, transformed into "wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests," (*Michigan v. Mosley* (1975) 423 U.S. 96, 102.)

The trial court correctly ruled that the sawed-off shotgun was admissible and the Rhode Island Supreme Court was in error in holding to the contrary and its judgments should be reversed.

ARGUMENT

I.

MIRANDA DOES NOT REQUIRE A PER SE EXCLUSION OF STATEMENTS OF AN ACCUSED IN CUSTODY WHO, ON BEING ADVISED OF HIS RIGHTS, INVOKES THE RIGHT TO COUNSEL AND THEREAFTER VOLUNTARILY AND KNOWINGLY WAIVES THAT RIGHT

The Fifth Amendment to the Constitution of the United States, insofar as applicable herein, provides that no person "shall be compelled in any criminal case to be a witness against himself."

In 1966, a closely divided Court announced certain procedural guidelines to be applied to custodial interrogations of persons suspected of crimes. These included warnings that the person had a right to remain silent, that statements made could be used against him, and that he had a right to retained or an appointed attorney before any questioning.

This Honorable Court stated that a defendant could waive these rights but that such a waiver would have to be made voluntarily, knowingly, and intelligently. A reasonable and faithful interpretation of the *Miranda* opinion rests on the intention of the Court to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of that right would be scrupulously honored." (*Michigan v. Mosley, supra,* 423 U.S. 96 at p.103.) Thus the giving of the warnings would *inform* the suspect of his rights and assure that any waiver was a knowing and voluntary one.

It was recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. (*Michigan v. Tucker* (1974) 417 U.S. 433, 444.)

Thus, while *Miranda* does not proscribe admission of voluntary statements of an incriminating nature, it does forbid admissions which are the result of *custodial interrogation* by the police of one who has not been advised of the right not to incriminate himself and to have the assistance of counsel in the exercise of that right.

And assurance was forthcoming that the decision (*Miranda*) would in no way create a constitutional straitjacket, that there should be no blanket prohibition against the admission of voluntary statements, or of a permanent immunity from further interrogation as would turn the *Miranda* safeguards into "wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." (*Michigan v. Mosley, supra,* 423 U.S. 96, 102.)

The procedure to be followed once the warnings were given to a suspect in custody prior to and during interrogation were outlined in *Miranda* as follows (384 U.S. at pp. 473-475):

> "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning . . . ."
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. State of Illinois,* 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977." (Emphasis added, footnote omitted.)

The question as to whether a suspect in custody can thereafter waive his right after he has invoked his right to remain silent was answered by this Honorable Court in *Michigan v. Mosley, supra,* 423 U.S. 96.

This Honorable Court held that as to one who indicated a desire to remain silent the *Miranda* opinion cannot be sensibly read to create a per se proscription of indefinite duration upon any further questioning. It was said that a faithful reading of *Miranda* must rest on the intention of the Court to adopt fully effective means to notify the person of his right of silence and "to assure him that the exercise of the right would be scrupulously honored," that the critical safeguard in the passage from *Miranda* is the

right to cut off questioning. (*Michigan v. Mosley, supra,* 423 U.S. at p. 103.)

The concurring opinion of Mr. Justice White in *Mosley* (page 110, footnote 2) notes that *Mosley* did not speak to the issue of one who indicates a desire to consult counsel and a suggestion was made that a later decision to make a statement in such circumstances without counsel's presence could be viewed with skepticism, *i.e.,* a possible heavier burden on the party presenting the statement.

This Honorable Court in the later case of *Brewer v. Williams, supra,* 430 U.S. 387, expressly refrained from holding under the Sixth Amendment right to counsel that a person in custody could never waive his right to counsel once it was asserted, saying that,

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (*Brewer v. Williams, supra,* 430 U.S. at pp. 405-406.)

Mr. Justice Powell, concurring, said that the opinion of the Court made it explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel.

Thus, the question as to whether a per se rule of exclusion applies to proscribe the admission of subsequent statements of a suspect in custody who has invoked his right to counsel is ready for decision.

Amicus submits that once a person in custody has been advised of his right to remain silent and his right to retained or appointed counsel and has invoked his right to counsel, he may thereafter, for reasons satisfactory to himself, knowingly, intelligently and voluntarily waive his right

and make statements and submit to questioning. Thereafter the prosecution bears a heavy burden to demonstrate that the waiver is knowing and voluntary but when this burden is met, the rule permitting admission of such statements conforms to the letter and spirit of *Miranda* and is consistent with the law as developed by this Honorable Court.

And this has been the holding of a majority of the federal and state courts that have recently had occasion to address the question.

The New Mexico Supreme Court in *State v. Greene,* 572 P.2d 935 (N.M. 1977), held that an accused person in custody, having invoked his right to have the presence of counsel upon being advised of his *Miranda* rights may subsequently waive his right to have counsel present during questioning, but, of course, the state has a heavy burden to demonstrate that the waiver is knowing and voluntary.

The New Mexico Court pinpointed two situations contemplated by the *Miranda* warnings, *i.e.,* (1) invocation of right to remain silent, in which case interrogation must cease and (2) invocation of right to have counsel, in which case the interrogation must cease until an attorney is present. The Court noted that this Court mentioned that continued questioning may result in admissible statements by the accused if the prosecution carries the heavy burden of demonstrating intelligent waiver of the right to counsel.

The New Mexico Court said that the first of these questions was answered by the decision in *Michigan v. Mosley, supra,* 423 U.S. 96, 101, 96 S.Ct. 321, 46 L.Ed.2d 313 (1951) holding that the invocation of the right to silence does not create a per se proscription upon further questioning, that the admissibility of statements

depends on whether the right to cut off questioning had been scrupulously honored.

However, that court noted that the holding of *Mosley* did not reach the second situation, where the right to counsel was invoked. After noting that since *Mosley* some jurisdictions have adopted a per se rule requiring advice of counsel (*i.e., State v. Boggs,* 16 Wash.App. 682, 559 P.2d 11 (1977)) the New Mexico Supreme Court rejected this view as unnecessarily rigid and beyond the scope and intent of the original *Miranda* decision and adopted what it termed the more flexible view expressed by the Ninth Circuit (*United States v. Pheaster,* (C. A. 9th Cir. 1976) 544 F.2d 353, 367-368, *cert. den.* (1977) 429 U.S. 1099) as follows:

> "'. . . . In *Mosley* the Court rejected a literal interpretation of *Miranda*, holding that the exercise of the right to remain silent does not preclude all further questioning. . . . Although the specific holding in *Mosley* is not direct precedent for the resolution of this appeal, *Mosley* does indicate both a recognition that the procedure set out in *Miranda* is not as clear as the language of that opinion might suggest and a willingness to impart a greater degree of flexibility in the application of *Miranda* to varying factual situations.
>
> "We have concluded that a waiver of rights under Miranda can occur despite an earlier demand to have an attorney . . . . The Government, of course, bears a 'heavy burden * * * to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' [Citations omitted.]" (572 P.2d at p. 940.)

Most of the Federal Courts of Appeal that have had recent occasion to rule on the matter have held that a defendant who has requested counsel may thereafter waive his earlier request for counsel.[1]

In *United States v. Hauck* (C. A. 8th Cir. 1978) 586 F.2d 1296, the Court of Appeal said that although *Miranda* stated that questioning must stop once the right to counsel has been asserted, it also stated that questioning could thereafter continue if the defendant specifically waived the right to counsel. The Court also rejected a contention that in that case there was the same subtle coercion that was condemned in *Brewer.* (586 F.2d at p. 1298.)

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[1] *United States v. Grant,* (C. A. 4th Cir. 1977) 549 F.2d 942.

Biddy v. Diamond (C. A. 5th Cir. 1975) 516 F.2d 118, 122, *cert. den.* (1976) 425 U.S. 950 [96 S.Ct. 1724, 48 L.Ed.2d 194].

United States v. Rieves (C. A. 5th Cir. 1978) 584 F.2d 740, 745, the defendant invoked his right to remain silent and asked to see an attorney; later initiation by defendant of dialogue with government agent affirmatively demonstrated that he wished to waive his right to remain silent.

United States v. Cobbs (C. A. 3rd Cir. 1973) 481 F.2d 196, *cert. den.* (1973) 414 U.S. 980 [94 S.Ct. 218, 38 L.Ed.2d 224], held even where law enforcement knew defendant had an attorney custodial interrogation without notice to attorney did not violate right to counsel or preclude admission of statements where defendant freely and intelligently waived right to counsel.

See also Coughlan v. United States (C. A. 5th Cir. 1968) 391 F.2d 371, *cert. den.* (1968) 393 U.S. 870, 895 [Ct. 159, 21 L.Ed.2d 139].

United States v. Hodge (C. A. 5th Cir. 1973) 487 F.2d 945, an arrestee can change his mind after requesting an attorney.

Moore v. Wolff (C. A. 8th Cir. 1974) 495 F.2d 35, court refuses to adopt a per se rule requiring suppression, (*see also* cases cited, pp. 36-37).

In *United States v. Rodriguez-Gastelum* (C. A. 9th Cir. 1978) 569 F.2d 482, 486, *cert. den.* (1971) 436 U.S. 919, the Ninth Circuit, in an en banc decision rejected the per se rule that once counsel has been requested a suspect can never change his mind and speak without an attorney being present.

See also United States v. Flores-Calvillo, (C. A. 9th Cir. 1978) 571 F.2d 512, in which a panel on rehearing, followed *Rodriguez-Gastelum, supra,* after having initially held that under *Mosley* a person in custody who asserted right to silence could waive it but that the waiver doctrine did not apply when the person had expressed a desire for counsel.

A majority of the states in recent decisions have also held that a defendant who asserted his right to counsel could thereafter voluntarily waive that right.[2]

It is submitted that *Miranda* does not foreclose an informed suspect from voluntarily waiving his previous exercise of the right to counsel. No rigid, inflexible rule is required by the language of *Miranda* and such would be

[2]*State v. Steelman* (Ariz. Sup. Ct. 1978) 585 P.2d 1213.

Battle v. State (Fla. 1976) 338 So.2d 1107.

Berryhill v. Rickets (Ga. 1978) 249 S.E.2d 197.

Korn v. State (Ind. 1978) 379 N.E.2d 444.

Lofton v. State (Ind. 1978) 378 N.E.2d 834.

People v. Young (Ill. 1978) 376 N.E.2d 739.

State v. Kellogg (Iowa 1978) 263 N.W.2d 539.

State v. Dominick (La. 1978) 354 So.2d 1316.

Ellerba v. State (Md. 1979) 398 A.2d 1250. (Maryland refused to adopt the minority rule, the so-called per se rule, which mandates exclusion of all statements given by an accused after counsel has been engaged unless counsel advised and given opportunity to attend when

contrary to the spirit of that decision as it has been applied over the years.

A defendant does not lose his right to make decisions in his own interest by invoking the right to counsel. Certainly a defendant, who may exercise his constitutional right to represent himself at the trial of guilt or innocence (*Faretta v. California* (1975) 422 U.S. 806) should not find himself unable to change his mind regarding counsel under *Miranda.* That decision should not mandate "installing counsel as the final arbiter of the privilege." (*Miranda v. Arizona, supra,* at p. 537, Mr. Justice White dissenting.)

statement made by defendant.)

Com. v. Watkins (Mass. 1978) 379 N.E.2d 1040, 1045.

Com. v. Santo (Mass. 1978) 376 N.E.2d 866.

People v. Parker (Mich. 1978) 269 N.W.2d 635, 637-638 (expressly rejecting a per se exclusionary rule but recognizing a difference between assertion of right to remain silent and assertion of right to counsel).

State v. Olds (Mo. 1978) 569 S.W.2d 745 (finding state did not meet its burden).

State v. Moore, 202 N.W.2d 740 (Neb. 1972).

Lee v. State (Okla. 1977) 560 P.2d 226, 233.

Steele v. Johnson (Ore. 1978) 586 P.2d 811, holding state had not born its burden.

Com. v. Myers (Pa. 1978) 392 A.2d 685.

Com. v. Peoples (Pa. 1978) 394 A.2d 956, 957-958.

State v. Pendergrass (S.C. 1977) 239 S.E.2d 750, 752

McPherson v. State (Tenn. 1978) 562 S.W.2d 210.

Williams v. State (Tex. 1978) 566 S.W.2d 919.

State v. Hohman (Vt. 1978) 392 A.2d 935 (held that state had not met its burden).

Lamb v. Commmonwealth (Va. 1976) 227 S.E.2d 737.

Schilling v. State (Wis. 1978) 271 N.W.2d 631.

II.

THE CONVERSATION BETWEEN PATROLMEN GLECKMAN AND McKENNA IN THE VEHICLE DID NOT CONSTITUTE INTERROGATION OF INNIS UNDER *MIRANDA* AND THE FIFTH AMENDMENT AND HIS VOLUNTARY STATEMENT CONSTITUTED A WAIVER OF ANY PREVIOUS INVOCATION OF THE RIGHT TO COUNSEL

Amicus has urged that a per se exclusion of any statement of a suspect in custody who has invoked his right to counsel is not required by a reasonable reading of *Miranda.* Amicus will now briefly address the two issues set forth in the majority opinion of the Rhode Island Supreme Court (*State v. Innis, supra,* 391 Atl.2d at p. 1161), whether (1) the defendant was interrogated within the meaning of *Miranda* prior to assisting in locating the shotgun and (2) if so, whether he voluntarily waived his rights under the Fifth Amendment.

The Rhode Island Court held that the conversation between Gleckman and McKenna constituted "interrogation" as that term was used in *Miranda* and likened the so-called "Christian burial speech" in *Brewer v. Williams, supra,* 430 U.S. 387 (which this Court said was "tantamount" to interrogation), to the conversation of the officers in this case, admitting that this constituted an "expansion" of the term "interrogation" as used in the Fifth Amendment context requiring *Miranda* warnings.

The Rhode Island Court put to one side the significant fact that *Brewer* was a Sixth Amendment case and that the right to counsel had attached because adversary judicial proceedings had commenced against the defendant. (See *Kirby v. Illinois,* (1972) 406 U.S. 682, 688.) That court also ignored the fact that the so-called "Christian burial speech" was directed to the defendant Williams, creating a form of compulsion, but more important, the "speech" was made for the admitted purpose of eliciting information of an incriminatory nature from a defendant against whom adversary judicial proceedings had been initiated and in the absence of counsel, a right which had attached under the Sixth Amendment.

In *Brewer,* the "speech" was "tantamount to interrogation" because it was *intended* to secure a response from the defendant and elicit incriminating information. In this case the officers were merely conversing with each other, this was the finding of the trial judge who heard the motion to suppress and there was no contrary evidence.

This Honorable Court restricted the decision in *Brewer* to the Sixth Amendment and spoke of the broad right of counsel which attaches when adversary judicial proceedings are instituted. This right does not require that one be in custody to be entitled to it or that he be subjected to interrogation as such or that there be compulsion.

(See *Massiah v. United States* (1964) 377 U.S. 201, 206.)

As the majority in *Brewer* said (*supra,* at p. 397):

> "Specifically, there is no need to review in this case the doctrine of *Miranda v. Arizona, supra,* a doctrine designed to secure the constitutional privilege against compulsory incrimination, . . ."

concluding that Williams was deprived of a different constitutional right — the right to the assistance of counsel.

The *Miranda* rules were intended to protect a suspect from being *compelled* to incriminate himself in the coer-

cive setting of custodial interrogation. *Miranda* requires that the suspect be informed of his right against self-incrimination and that this right would be scrupulously honored and that *questioning* would cease when he invoked his rights.

Amicus submits that "interrogation" as used in *Miranda* has not been "expanded" by *Brewer* and it should not receive any broader definition than originally set forth.

This Court's decision in *Miranda*, setting forth rules of procedure, defines "custodian interrogation" as follows:

> "By custodian interrogation we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added.) (*Miranda v. Arizona, supra,* 384 U.S. at p. 444; *see also Oregon v. Mathiason,* (1977) 429 U.S. 492, 494.)

This meaning of interrogation is the accepted definition of that term, *i.e.*, questioning, inquiring.[3]

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[3]Ballentine's Law Dictionary (3rd Ed.) defines interrogation as:

> "Propounding questions, questioning, especially a witness, a prospective witness, or one suspected of the commission of a crime."

"Webster's New International Dictionary (Second Edition, Unabridged) defines interrogate:

> "To question; esp. to question formally; to examine by asking questions; as to interrogate a witness."

And interrogation as:

> "Act of interrogating, or questioning; inquiry; also, a question put; an inquiry."

No case has suggested that the term "interrogation," as used in *Miranda*, would include conversation between two persons not directed to a suspect and without a design to elicit incriminating statements from one in a coercive custodial setting.

Any intimation in the majority opinion of the Rhode Island Supreme Court that Gleckman's conversation with McKenna was a clever "ploy" to secure an incriminating response finds no support in the record. It is inconceivable that Gleckman, an officer with less than two years experience, would take it upon himself to disobey a direct order of a superior officer, Captain Leyden, and attempt to devise such a scheme.[4]

It is evident that there was no impermissive custodial interrogation in this case and that any statement of the respondent in the vehicle was voluntary and not the product of compulsion or coercion.

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[4]In fact, what Gleckman said to McKenna was apparently correct, *i.e.*, the nearby location of the school for handicapped children and the danger posed by the shotgun, and it was not an intentional misrepresentation to secure a response as in *Frazier v. Cupp* (1969) 394 U.S. 731, at p. 739, which misrepresentation was not held to be of sufficient significance to render inadmissible an otherwise voluntary confession.

See also United States v. Collins (C. A. 2d Cir. 1972) 462 F.2d 792, 797, which held mere plea to confess to prevent more killings, bloodshed, amounted to no more than an exhortation to reevaluate defendant's decision in that case to remain silent, and was not violative of *Miranda*.

And *United States ex rel. Henna v. Fike* (C. A. 7th Cir. 1977) 563 F.2d 809, in which the court rejected an attempt of the petitioner to draw a parallel between the detective's suggestion that he was looking for a missing man who was injured and the "Christian burial speech" in *Brewer, supra,* stating that the detective's suggestion was neither calculated nor coercive as was the behavior of the police in *Brewer. (See also United States v. Hauck, supra,* (C. A. 8th Cir. 1978) 586 F.2d 1296, 1298.)

The trial judge, who heard the witnesses, concluded that there was clearly a waiver when Innis spoke, "Stop, turn around, I'll show you where it is." Amicus submits that this was a voluntary act done with full knowledge of his right to remain silent and to have the assistance of counsel and constituted the waiver of which this Court spoke in the recent case of *North Carolina v. Butler*, ____ U.S. ____ [47 Law Week 4454, decided April 24, 1979].

In *Butler*, in rejecting an inflexible per se requirement of an express or written waiver of rights, this Honorable Court said,

> "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of the waiver, but it is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case . . . ."

In this case, as in *Butler*, there is no question that Innis was adequately and effectively apprised of his rights, and, of equal importance, he was under no compulsion to speak at all, much less to make incriminating statements.

He already had been told by three officers of his rights under *Miranda* and, when he invoked the right to counsel, any questioning that would have taken place was cut off and his right was scrupulously observed, Captain Leyden ordering the custodians of the prisoner not to question or coerce him in any way. Innis must have heard this order as he apparently also heard the conversation between Gleckman and McKenna.

After he spoke, he was again given the *Miranda* warnings and expressly waived his rights and indicated he wanted to show the officers where the weapon was located.

A suspect may properly make an assessment of his interests and conclude, for reasons satisfactory to himself, that he should waive his right. His action may have been out of compassion (the trial judge commended him for it) or it could have been for a more selfish reason. The fact is he was under no compulsion to do anything.

Innis, having been informed of his rights and having invoked the right to counsel, made a voluntary and intelligent waiver of his previously invoked right.

Finally, the Rhode Island Supreme Court attempted to invoke the rule in *Wong Sun v. United States* (1963) 371 U.S. 471, and concluded that the discovery of the shotgun was the "fruit of the poisonous tree." It is submitted that *Wong Sun* is not applicable for there was no violation of a *constitutional* right. As this Court said in *Brown v. Illinois* (1975) 422 U.S. 590, 602, "Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment." It does not govern this case.

In any event, the major premise of the court below, that there was an illegality in obtaining the original statement, is fallacious and it follows that there is no "taint" to purge. Rejecting the premise, amicus must also reject the conclusion that is sought to be drawn therefrom.

It must be concluded that the shotgun, the object of the motion to suppress, a most reliable and trustworthy item of physical evidence, was properly admitted and presented to the trier of fact in this case, that there was no impermissible custodial interrogation in violation of *Miranda* and that the defendant voluntarily and with full knowledge of his

rights, waived his previously invoked right to counsel, and that the statements and the weapon were not the product of illegal police procedure.

CONCLUSION

The balance struck by *Miranda* was an extremely close one, five to four decision over strong dissents. The majority of the Court weighed the interest of society and law enforcement in "a proper system of law enforcement" and argued that the Court has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties, concluding that the holding of the Court "should not constitute an undue interference with a proper system of law enforcement" and that the decision of the Court "does not in any way preclude police from carrying out their traditional investigatory functions." (*Miranda v. Arizona, supra,* 384 U.S. at p. 481.)

It is submitted that a rule that would exclude the weapon in this case from evidence on the ground that the voluntary statement of respondent was obtained in violation of this Court's holding in *Miranda* would most certainly interfere with law enforcement agencies in the performance of their investigative duties and would preclude the police from carrying out their traditional duties in a proper system of law enforcement.

Amicus submits that a sensible reading of *Miranda* does not require such a result.

However, if the rules developed by *Miranda* and its progeny require the suppression of this weapon for the reasons relied on by the Rhode Island Supreme Court, then amicus submits that THIS IS THE CASE for the re-examination of *Miranda* and the overruling of a judicial "straitjacket" and the removal of an "irrational obstacle" to legitimate police investigative activity.

Respectfully submitted,

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